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## U. S. Court of Appeals Interprets "Investigation" for NPDB Reporting Purposes

### Introduction

The U.S. Court of Appeals has provided new guidance in determining when an "investigation" concludes for purposes of reporting to the National Practitioner Data Bank ("NPDB"). Under the Health Care Quality Improvement Act ("HCQIA"), hospitals are obligated to report certain events involving the membership or clinical privileges of physicians to the NPDB. These events include a physician's surrender of clinical privileges "while under investigation by the entity relating to possible incompetence or improper professional conduct." 42 US § 11133(a). With no statutory definition of "investigation," hospitals and health care entities often struggled with determining exactly when an investigation begins and ends. However, on January 14, 2009, the U. S. Court of Appeals for the First Circuit issued the first ever opinion exploring the interpretation of "investigation" for these purposes.

This opinion clearly states that an "investigation" ends only when a health care entity's decision making authority either takes final action or formally closes the investigation. Doe v. Leavitt, 552 F.3d 75, 86 (1st Cir. Jan. 14, 2009).

### Analysis and Background

A complaint was filed against Dr. Doe and the hospital appointed an ad hoc committee to investigate after temporarily suspending Dr. Doe's privileges. Following the committee's investigation, the Hospital offered Dr. Doe a conditional opportunity to return to work. Dr. Doe rejected the proposal and voluntarily relinquished his clinical privileges. The Hospital accepted his resignation and reported it to the NPDB since he had resigned while "under investigation." Dr. Doe requested an administrative review of this report, arguing the investigation had ended prior to his resignation. The Secretary of Health and Human Services ("HHS") issued a written decision that the Hospital had appropriately reported Dr. Doe to the NPDB. Dr. Doe appealed this determination to the Court of Appeals, which affirmed HHS' finding and reinforced their interpretation that an "investigation" ends only when a health care entity's decision making authority either takes final action or formally closes the investigation.

The court noted how HHS used both the plain language of the statute and its initial construction of the word "investigation" in the National Practitioner Guidebook in determining the meaning in its final decision. The court reinforced the importance of HHS granting each side an opportunity to make its case on the issue prior to reaching its conclusion. The court further took into consideration HHS' expertise and consistency

in interpreting and applying the provisions of HCQIA. The court emphasized the importance that HHS has consistently used the same interpretation for "investigation" as it used in this case. The court reinforced that the most important factor was HHS' consideration of Congressional intent underlying HCQIA, which was to improve the quality of health care through reporting unprofessional behavior. By defining "investigation" so broadly, the court considered the HHS position to be consistent with Congressional intent and closed unintended loopholes that allowed facilities to avoid required reporting on a provider to the NPDB.

The Court also noted that a Hospital's bylaws may offer guidance as to whether an investigation has been initiated relative to the HCQIA. Yet it cautioned that the language contained in a Hospital's bylaws do not necessarily drive whether an investigation has commenced and/or concluded under HCQIA and for NPDB reporting purposes. Further, the court specified that the Hospital cannot use the bylaws to contradict or otherwise alter the HHS interpretation that an "investigation" ends only when a health care entity's decision making authority either takes final action or formally closes the investigation.

The court's opinion offers valuable guidance that should be incorporated in Medical Staff Bylaws and peer review policies.

#### **Practical Take-Aways:**

- ❖ While not binding in other federal court circuits, this opinion provides guidance for Hospitals by indicating the interpretation of "investigation" other federal courts will likely follow in similar cases.
- ❖ Hospitals that utilize a formal peer review process should consider incorporating the court's definition of "investigation" into their Medical Staff and physician employment activities to ensure compliance with HCQIA reporting requirements.
- ❖ Hospitals should consider defining "investigation" within their facility's Medical Staff Bylaws that will provided clarification as to when an investigation commences.
- ❖ Hospitals should evaluate the appropriateness of physician performance improvement or corrective measures they use taking into consideration the court's new definition of "investigation."

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